

Certain legal aspects of the Himalaya clause in the contract of international carriage of goods by sea

A critical perspective on legal challenges raised by the clause under international uniform law and general contract law principles

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1 Introduction

Subject of the thesis

The Himalaya clause is a contractual term that, since its inception, has sparked numerous discussions as to its admissibility and validity, both in the common law and the civil law systems: it has even been described by some as “*an ingenious, short-term solution to a difficult problem, but a solution that raises infinitely more problems than it solves*”¹.

As a contractual clause contained chiefly in bills of lading (but in charter-party agreements alike), it has been conceived by the commercial practice in order to protect subjects involved in the various operations of carriage of goods by sea but who are not formally party to the contract of carriage which, as such, would be exposed to the claims of the cargo interests without being able to avail themselves of the defenses and limitations of liability that the carrier can benefit from being party to the contract.

The Himalaya clause has then the merit of recognizing the importance of the operations carried out by the so-called third parties (servants, agents, independent contractors such as stevedores and other port operators, inland carriers, to mention but a few): its success and the validity of the rationale upon which it is founded, has been confirmed by the introduction in the Brussels Convention of a provision that replicates some of its effects, but this has nevertheless not silenced the debate around the proper legal qualification of the

¹ W. Tetley, *Marine Cargo Claims*, 4 ed., 2008, p. 1856

clause (in light of contract law and exclusion of liability clauses mainly) and its overall impact on the international uniform law.

Considerations based on the reflection that the vast majority of literature that deals with the Himalaya clause comes from the common law experience² inspired the selection of topics of this contribution towards areas that have not received great attention by scholars when dealing with such clause, especially under civil law academia. For these reasons, the topic that always accompanies any discussion on the Himalaya clauses, i.e. privity of contract at common law, will not be touched upon in this work³, whereas issues such as the correct contractual construction of the clause, the amplitude of the exclusion of liability that it confers and its coordination with the international uniform law and other contracts will be discussed in detail.

As per legal sources, no specific national legal background is offered and case-law and national legislation when referred to, will draw from different countries, with the exception to the chapter 2 where most of the references will be to civil law countries, in an attempt to give the reader a complete picture of the legal category of the “contract to the benefit for a third party” (which is not found in common law countries). The backdrop against which the Himalaya clause will be analyzed is the international uniform law that presides over the matter of international carriage of goods by sea⁴.

In light of the above, it can be affirmed that the aim of this work is to give an overview on the one hand of some of the main legal issues that have challenged the validity of the Himalaya clause and on the other hand of the benefits and advantages brought about by the clause over the years of its existence.

² Due to the commercial reality of the shipping business where most charter-party agreements and bills of lading are governed by English law and due to the fact that the difficulties posed by the common law doctrine of privity of contract challenged throughout the years scholars in trying to “save” the clause by justifying it under different theories.

³ Unfortunately, space constraints imposed upon this work are also to be blamed

⁴ The International Convention for the Unification of Certain Rules Relating to Bills of Lading, Brussels, 1924, as amended by the Protocols of 1968 and 1979, referred to as Hague-Visby rules henceforth; the UN Convention on the Carriage of Goods by Sea, 1978, so-called Hamburg rules; UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009, so-called Rotterdam rules; these conventions will be referred to in this work as “international uniform law” as well.

Linguistic note: for the purposes of this work, the following terms shall be considered interchangeable: Merchant, cargo receiver, consignee, cargo owner, bill of lading holder, claimant, cargo claimant, shipper, cargo interests, creditor of the carriage.

2 The validity and the protection of the Himalaya clause in relation to the international uniform rules

Under the notion of Himalaya clause is contemplated a contractual term inserted in bills of lading or charter-party agreements and whose aim is to benefit subjects which are not privy to the contract of carriage: these benefits consist in holding the third party not liable or extending to it the defenses and limitations of liability of the carrier whenever this beneficiary, by means of a negligent conduct in carrying out his obligations, produces a damage to, loss of or delay in delivery of goods carried under the contract of carriage.

As for many contractual clauses elaborated by the commercial practice, there is no unique version of this clause: a version elaborated and recommended by BIMCO will be taken as the “specimen” clause for this dissertation: the clause is available at the following web-site:

[https://www.bimco.org/en/Chartering/Clauses/International Group of PI Clubs Himalaya Clause.aspx](https://www.bimco.org/en/Chartering/Clauses/International%20Group%20of%20PI%20Club%20Himalaya%20Clause.aspx) ⁵.

The Himalaya clause proper⁶, typically contains two main clauses which aim at achieving different results: the first one (letter (a)) aims at giving a total protection by granting to all third parties involved in the carriage of goods an

⁵ The text of the clause is not incorporated here due to its length, but reference will be made to the letters that refer to the different sub-paragraphs; for the historical background to the clause and the reason behind its name, see W. Tetley, *Marine Cargo Claims*, 4 ed., p. 1853.

⁶ As opposed to the wider draft of the clause that appears in most bills of lading and contains also a second provision referred to as circular indemnity clause: see p. 42

immunity for tort liability against the claims brought by cargo receivers; the second sub-clause (letter (b)) purports to extend the benefits that the carrier receives *ex lege* under the international uniform conventions on carriage of goods by sea, the Hague-Visby rules, Hamburg rules and Rotterdam rules) applicable to the contract of carriage to the third parties involved in the carriage of goods against claims from the cargo owners⁷: the advantage over the international uniform rules that should be attained by means of this provision in the Himalaya clause is to extend the carrier's defenses to *all* third parties involved in executing, directly or indirectly, part of or all of the carriage, regardless of the formal legal qualification of this party and of its relationship to the cargo receiver: the different international conventions on carriage of goods by sea do not provide this protection for all third parties, but only for some third parties involved in the carriage and only to some extent (the conventions do not provide for a total immunity of the third parties protected under their rules).

In order to better explain how the Himalaya clause has brought about a significant advantage by applying indistinctly to all third parties, it is necessary to first describe what third parties receive protection under the uniform regime and highlight the difficulties that arise in determining the position of a specific category of third parties, namely the one of independent contractors. This discussion will be the subject matter of the next paragraph.

The first provision of the Himalaya clause, by granting total immunity to third parties, implies an exclusion of liability and will be discussed in the context of the rules pertaining to contractual exclusion of liability. The effects of such total exclusion of liability, if allowed under the ordinary rules on exclusion of liability clauses, will then be tested as per their legitimacy against the backdrop of the relevant international uniform rules.

It must be noted how, the second sub-clause can also be construed as a clause that limits the liability of its beneficiary: as a matter of fact, to extend to a subject defenses and liability limitations, results in limiting (not totally, but partially) the liability amount of this party: therefore, this second clause will also be

⁷ The group of third party beneficiaries referred to in the clause by "Servant" is the same in the first and the second sub-paragraphs.

mentioned in the chapter on the exclusion of liability clauses and discussed as per its validity under the relevant rules on non-responsibility clauses.

2.1 Differences in the notion and protection of third parties under the international uniform law and the Himalaya clause

2.1.1 Hague-Visby rules protection

The 1968 Protocol (Visby rules) by means of Art 4-bis n. 2 and 4, which emended the Brussels Convention of 1924, introduced a protection also for parties other than the carrier involved in the carriage of goods: servants and agents of the carrier would thus benefit of the same defenses and limitations of liability that are applicable already to the carrier *ex lege*⁸. This legislative amendment will apply only so long as the servant/agent has acted within the scope of its duties and has not caused the event by means of a reckless conduct with knowledge that the damage would have been produced or with the intent to cause the damage (Art 4-bis (4))⁹.

Once the important matter of protecting certain subjects involved in the carriage operations from the negative consequences of a direct action in tort from the injured party¹⁰, a different question arose as to the interpretation of what categories of third parties would benefit from this statutory protection.

The Brussels Convention in its French version (both English and French are the official languages of the amendments)¹¹ protects the role of the *preposés*, while the English text mentions servants and agents, expressly excluding from its remit

⁸ This need for a legislative approach was also spearheaded by the difficulties in applying and construing the Himalaya clause, which already existed at this time: the Himalaya clause stems from the *Adler v Dickson* case of 1955: see W. Tetley, *ibid.*, p.1853.

⁹ It is interesting to evidence how a similar amendment had been introduced in the sector of air carriage by means of the 1955 Hague Protocol which reformed the 1929 Warsaw Convention.

¹⁰ See above rationale for protection of third parties before a direct tort action.

¹¹ Which is the official version of the Convention alongside with the English one with regards to both 1968 Protocol (Art 17) and the 1979 Protocol (Art XI): the one introducing Art 4-bis is the one of 1968.

independent contractors¹². During the *travaux préparatoires* (Conference of Stockholm 1963) it was not felt needed that the French version contain a specific exclusion of independent contractors, as *preposés* only refers to workers employed by the carrier, whereas the English term agent does not necessarily refer to an employment relationship. From these elements it seems that the intention of the legislator was to exclude subjects that are not under employees of the carrier or that are not legally bound to the orders and instructions of the carrier (regardless if they are employees of the carrier).

The majority of authors seem to consider under the categories of servant/agent of the Brussels Conventions, workers employed by the carrier and those subjects that are not subordinate to the carrier but that are however part of its business organization (such as master and crew of the vessel)¹³ while excluded should be the subjects not part to the carrier's business structure¹⁴. It is easy to understand how this point is rather delicate, as from these distinctions depends the possibility of extending the carrier's protection also to an important part of the transportation chain: the category of independent contractors is in fact rather wide and comprises a large number of different professions in the phases of the discharging and loading of the goods from and onto the vessel: the fact that the operations these subjects are imputed to imply almost a constant direct contact with the goods makes such phases statistically speaking prone to mistakes and higher chances of damaging the goods arise thereof. These activities are carried out by port operators (stevedoring firms for example): these subjects can either be contracted by means of an agreement of service by the carrier and their activities, if causing damage to the goods, will found extra-contractual liability towards the cargo owner or, they can be directly engaged by the cargo interests

¹² From Art 4-bis (2): "... *such servant or agent not being an independent contractor...* "

¹³ The master and crew are often directly employed by the shipowner and not by the carrier when the carrier is a Non Vessel Owning Carrier and the carrier has chartered the vessel from the shipowning company: in this case the acts of the crew for the purposes of personal liabilities arising out of the performance of the carriage contract will be vicariously imputable to the carrier by virtue of a so-called *employment clause*

¹⁴ W.Goldie, *The carrier and the parties to the contract of carriage*, 1979, p. 616; J. Donaldson, *Servants and Agents*, 1983, p. 209

for the loading/discharging operations and in such case the contract between these two parties will regulate a possible claim for damages to the goods (and will override any exemption clause contained in the carriage contract benefiting the stevedore).

Unfortunately no guidance as to how to correctly construe the scope of the concept servant/agent derives from successive international conventions on carriage: the 1974 Athens Convention on the transportation of passengers replicates the category of servant/agents without further refining the meaning of it.

2.1.2 Hamburg rules protection

In the field of carriage of goods by sea, the Hamburg convention is the international legal instrument that follows the Brussels convention.

These new rules do no longer expressly exclude an independent contractor from the subjects protected (Art 7(2)), but further refine the requirement for the protection afforded: the third party must act “within the scope of its employment” (Art 7(2)) and this makes it difficult to argue that an independent contractor is an employee of the carrier as it is not acting under the direction or supervision of the carrier; furthermore, it must be highlighted how the French version of these provisions (as opposed to the Brussels convention) contains a reference not only to *preposés* but also to *mandataires*, a category that could be translated as representatives (acting on behalf) of the carrier; on the other hand, some doctrine submits that the removal of the express exclusion of independent contractors and the insertion, in the French text, of the category of *mandataire*, cannot be ignored and that it should be interpreted as the intent of the uniform legislator to protect also independent subcontractors when their position can be subsumed under the role of agent: this would be the case when the subcontractor, even if not formally subordinated to the carrier, is nevertheless following his instructions and orders¹⁵: this interpretation seems to collide though with the preparatory works behind the convention, where the CNUDCI, in

¹⁵ W.H.C. Goldie, *The Carrier and the parties to the contract of carriage*, p. 625

1976, drafted a text of Art 7 that duplicates almost *verbatim* the one of Art 4-bis Brussels Convention¹⁶.

Lastly, as to the correct construction of the category of servant/agent, it must be noted that the presence of 6 official texts in the different official languages makes it difficult to find an interpretation of these categories that fits all purposes: some of the difficulties stem also from the hard task of transposing the meaning of terms such as “agent” in the civil law system which does not recognize such legal category in the common law meaning.

The introduction of the category of *actual carrier* cannot be ignored with respect to the effects that it can have on third parties involved in the carriage of goods: it must be determined if the independent contractors can fall in the group of the actual carrier: if this question is to be answered in the affirmative, the peculiar liability regime adopted for such category which also benefits from the carrier’s exemptions and limitations, will then be applicable to the independent contractors as well (Art 10, specifically, paragraph 2) whereas, if the answer is negative, then the independent contractor will not benefit from the carrier’s liability regime: the inclusion in the category of actual carrier is thus significant for this third party, whereas for other third parties, such as servants/agents, their inclusion in this category would imply burdens more than benefits (as they already benefit from the defenses of the carrier ex Art 7). The actual carrier’s position, for the purposes of its liability for damages/loss/delay pertaining to the goods, is regulated directly by the rules of the convention (just as the position of the carrier): this is different from the liability of the servants/agents which is not regulated by the conventions (conventions of Brussels and Hamburg). The actual carrier is thus one party that is third to the contract of carriage (third as in not the party that enters into the contract of carriage vis-à-vis the shipper/cargo receiver) but whose position is regulated in terms of liability. The actual carrier is defined in the convention in Art 1(2) as “... *the person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been*

¹⁶ G. Auchter, *La convention des Nations Unies sur le transport de marchandises par mer de 1978 (Règles de Hambourg, 1978)*, European Transport Law, 1979, p. 397

entrusted". Art 1(2) read in conjunction with Art 4(1) and (2) seem to preclude the possibility of including the activity of discharging and/or loading cargo in the specific operations that can be delegated to an actual carrier and thus the possibility of considering stevedores (or other terminal operators) as actual carriers is to be excluded¹⁷.

Another observation to be made for the sake of a logical approach to the matter, is that, once the discussion on the amplitude of the category of servants/agents (under the two different conventions) has been conducted and resulted in leaving out the category of independent contractors, it must be pointed out that the conventions do not include independent contractors in the category of beneficiaries of the carrier's protection, but the same conventions do not exclude that their position be relieved as to their liability by means of a contractual agreement (except for specific third parties, namely shipowner as ex Art 3(8) Brussels convention or the actual carrier ex Art 23 Hamburg rules).

2.2 Techniques adopted to equate the effects of a tortious claim to a contractual claim under the international uniform law rules

As evidenced above, the peculiar protection granted to third parties to the contract of carriage consists in making them benefit of the liability limitations and exclusions granted to the carrier. It is interesting to mention the technique used in order to realize this assimilation in the liability position of the third parties to the carrier's.

This solution has been introduced first by the Himalaya clause, subsequently implemented in aviation law by the Hague Protocol 1955 which modified the Warsaw Convention of 1929 and only then appeared in the maritime sector in occasion of the Visby Protocol in 1968 modifying the Hague rules by introducing Art. 4-bis(2) and (3), later on reaffirmed in the body of the Hamburg rules and the Rotterdam rules, respectively Art 7(2)/Art10(2) and Art 4(1).

This device consists in a procedural rule, that allows the third party (the third party protected will vary based on the rules that apply to the bill of lading) to

¹⁷ See more in Sze Ping-fat, *Carrier's Liability under the Hague, Hague-Visby and Hamburg rules*, 2002, p. 29

avail itself of the defenses and limitations of the carrier against any claim brought by the cargo interests in relation to damages/loss or delay of the cargo suffered by the claimant. The nature of the claim presented before the court (meaning, the fact that the claim is extra-contractual), for the purposes of the protection of the third party against liability, is then not relevant, as the effects of the carrier's protection are extended onto the claims against the third parties.

This liability regime introduced in the field of transportation "dissolves" the differences between a tortious liability and a contractual one.

All possible attempts by the cargo interests to bring a recourse based in tort in the hope to receive a more advantageous liability regime are thus rendered futile by this legislation: an extra-contractual action is typically more burdensome for the claimant as fault of the third party must be proven in addition to a causation nexus between the fault and the damages/loss suffered (furthermore, some legal systems recognize the admissibility of a tortious claim only if the damage impinges on a right/interest of the person *erga omnes*, not a right of credit; see p. 29), while the contractual claim based on the carriage of goods by sea is less onerous as it will suffice for the claimant to prove that a specific damage occurred while the goods were under the control of the carrier (so-called period of liability), thus avoiding the difficult proof of the causal connection.

Despite the more onerous nature of the extra-contractual action, this claim would have been certainly preferred to the one based on contract as it would not have been governed by the uniform rules affording the carrier's limitations to the third party and resulting in a possibility for the cargo interest of recovering the full amount of his loss.

Summing up, it can be said that the extension of the carrier's defenses and limitations to the servants and agents has eliminated the difference between the two liability regimes applicable following a contractual claim and an extra-contractual one, and, as a result, also deprived cargo interests of the incentive, represented by the extra-contractual recourse itself, of pursuing their claim against such named third parties.

2.2.1 Rationale behind Himalaya clause and uniform law protection of third parties

The introduction of this protection was justified by the fact that if a cargo interest wanted to recover damages his claim could have been subject to different regimes and outcomes depending on what party he directed his action against: if he pursued the carrier for the damages caused by its servants/agents, the carrier would have been able to shield itself behind the limitations of liability, even in the context of vicarious liability, whereas the servant would have been exposed to full liability.

This point and in general the difference in the regulation of the liabilities described above, created an unequal field that had to be addressed also because it would have exposed the servant/agent, typically an economically less strong subject than the carrier, to a high and onerous claim for the fault that even though he committed, was the result of the entrepreneurial activity of the carrier where the latter and not the former ought to suffer the risks thereof.

But a closer look at the rationale of this measure reveals that its purpose is not to protect the servant against the carrier (encouraging a channeling of all actions against the carrier, which is realized by this feature alongside with other ones like the circular indemnity clause, also contained in the Himalaya clause, or vicarious liability), rather to protect the carrier itself which will ultimately benefit from such (contractual and legislative) provision: as a matter of fact, the risk of exposing servants and agents to high claims (and hold them liable for them) would translate in higher business costs for the carriers as the high liabilities of the servants would have to be compensated by the carriers and higher insurance costs would be applied by the insurers. It comes then as no surprise that the extension of the carrier's liability to its servants/agents was first contained in a contract and only subsequently appeared in the legislation, as the contract is the expression of the direct and closest interests of the parties involved in the trade.

2.3.1 Legitimacy of the Himalaya clause with respect to the period of responsibility of the Hague-Visby and Hamburg rules

The above considerations on the uncertainties surrounding the exact extent of the category of servants/agents highlight how it is still relevant to include a

Himalaya clause for the protection of third parties involved in different fashions in the carriage of goods by sea (especially relevant for those third parties not protected under the rules). Nevertheless, the effect of a Himalaya clause extending the carrier's statutory protection to all third parties involved in the carriage (in the specimen clause provided in this contribution, the third parties are referred to as "Servant") cannot always be legitimate in light of the so-called *period of responsibility* of the carrier. The actions of the third parties must come within the remit of the execution of the obligations of carriage assumed by the carrier: the delimitation of this scope is also to be coordinated with the period of responsibility of the carrier, which is the period under which the carrier can assume obligations (and liabilities can arise) with regards to the activities of the carriage of goods. This period varies in the different conventions, thus expanding the number and types of different obligations imputed to the carrier under the contract of carriage. This means that a larger scope of activities are deemed to be part of the carriage (for the purposes of the liability of the carrier, its servants or independent contractors), thus acknowledging the carriage as an operation not consisting in just the transfer of goods from one point to another, but as a multi-faceted operation where different activities are conducted. It is in light of this that the different conventions are to be read in their attempt to recognize the new developments of the commercial activities related to the carriage of goods and provide legal protection to this activity¹⁸.

The Hague-Visby rules determine the *period of responsibility* from the moment the loading has commenced to the time the goods are discharged from the vessel (Art 1, definition of carriage of goods: so-called "*tackle-to-tackle*" period); Art 2 Hague-Visby rules confirms this interpretation by naming the operations relating to which the immunities and rights regarding the liability of the carrier apply, thus excluding the operations of the third parties that act before the loading and/or after the discharge¹⁹. This means that port operators might not be protected if their activities either precede the loading or follow the discharge. Art

¹⁸ See p. 46 to compare different views contained in chapter "Coordination of Himalaya clause with other contracts"

¹⁹ Art 2: "*in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods*"

7 of the Hague-Visby rules confirms this approach as it provides for freedom of contract when admissible for the parties to the contract of carriage outside this period: the carrier and the receiver will have a bill of lading that will not be governed by the uniform rules outside the period of liability of the rules and will be able to freely agree terms of liability and exclusions (taking also in account though that national laws governing this part of the carriage might be mandatory and thus reduce the free will of the parties).

The period of responsibility of the Hamburg rules includes not only the period from the loading to the discharging but also the phases *prior* to the loading and/or subsequent to the discharge of the goods but while the carrier still is in charge (“*sous sa garde*”) of the goods (Art 4(1)); this timeframe of responsibility is also referred to as “*port-to-port*” period. Art 4(2) tries to define precisely the moment in which the overtaking of goods in charge of the carrier takes place: the goods enter under the custody of the carrier the moment he receives them from the shipper or a public authority (according to the public laws applicable to the port of loading). These operations have to be carried out in the port area, so operations that are functional to the carriage but take place outside of the port will not be considered under the period of cover. The same applies to the end of the period of liability of the carrier. Thus it follows that the servant or agent who is employed at an inland point will not enjoy the regime of rights and immunities afforded to the carrier under the Hamburg Convention. This is confirmed by the definition of “contract of carriage by sea” contained in Art 1(6), where the carriage is to be regarded (for the purposes of the application of the convention) as “*from one port to another*”²⁰.

From all of the above, it flows that, a Himalaya clause that extends the carrier’s protection onto independent contractors²¹, will not be admissible as it would confer benefits typical of the contract in which it is contained to a situation which is not part of the contract: the contract of carriage when regulated by the

²⁰ See also p. 229, “*Impact of the Rotterdam Rules on the Himalaya Clause*”, Jason Chua

²¹ But also when such clause aims at completely excluding the liability of the third party, see below p. 29

Hague-Visby rules will not admit port phases under its remit, and thus a clause that purports to extend the carrier's defenses and limitations of liability to independent contractors will not be applied with regards to the fact that independent contractors consume their activities most typically in port areas assisting in loading and discharging, thus, once again, outside the scope of application of the contract of carriage with all its terms and clauses (among which, the Himalaya clause). The Hamburg rules, on the other hand, introduced a wider period of responsibility for the carrier, hence seem to open up for the possibility of protecting, by means of a Himalaya clause, independent contractors that carry out their operations in the port areas²².

It is clear how then, if the Himalaya clause can overcome the difficulties presented by the dichotomy servants/agents vis-à-vis independent contractors, it cannot overcome the challenges posed by the period of responsibility, at least when such period is very limited as it is in the Hague-Visby rules. Case law that proves the impact of the period of responsibility on a Himalaya clause that purports to protect terminal operators consists in an instance in which a national court rejected the clause on grounds of its inapplicability to third parties outside the scope of the contract come from Italy²³: in this case, the Court of Appeal adopted an exact interpretation of the Hague-Visby rules – the international convention applicable to the case at hand which involved an international carriage - where, according to Art 1 (e), the carriage is a *tackle-to-tackle* one thus excluding the validity of the specific Himalaya clause which aimed at protecting a terminal operator of the port of Genoa whose activities took place prior to the loading of the goods.

The research of this contribution focuses on the possibilities of protecting third parties by the Himalaya contractual clause and the legal implications that it brings about vis-à-vis the uniform rules; it must be submitted that, where the international uniform rules do not regulate and do not prohibit limitations of liability (namely independent contractors and their liability), it is also possible

²² See Sze Ping-fat, *ibid.* p. 29

²³ Corte Appello Genova 18 January 2003, *Zurich International v Terminal Contenitori*

for States signatories of the conventions to adopt national legislation aimed at protecting such parties: this can have a repercussion at national level also on the Himalaya clause, the need of which might be diminished in presence of national statutes that already protect third parties. It can be of practical benefit to recall two different solutions adopted in certain European countries: the example from the Scandinavian countries stands out for its own peculiar feature of extending the carrier's protection to all subjects for which the carrier is vicariously liable: as the effect of the Visby protocol, Section 282 was introduced in the Norwegian Maritime Code²⁴, thus protecting also stevedores under the rules that the convention provides for the carrier (and the servants/agents)²⁵.

Other notable examples are the French legislation, which enacted a specific national act for the protection of stevedores, providing for their total immunity against cargo interests and liability only towards their principal for damages to the goods²⁶. The protection of stevedores and other terminal operators contained in the Scandinavian and French systems are not found in other significant legislations as the German and Dutch ones, which only cover crew, ship-owner and servants of the carrier²⁷.

The difficult construction of the categories of servants/agents and independent contractors imposed by the Hague Visby rules and the ensuing uncertainty as to the liability regime of important players in the shipping commerce, inspired the sector operators to adopt an international convention. The UNCITRAL Convention approved in Vienna in 1991 was the outcome of this process, an international uniform law act meant to govern, among others, the liability aspects of port operators (the name of the convention was in fact United Nations Convention on the Liability of Operators of Transport Terminals in International Trade). Unfortunately the conventions did not enter into force for lack of a sufficient number of ratifications.

²⁴ The corresponding provision in the Swedish text can be found in section 13.32 of the Maritime Code

²⁵ Falkanger, Bull, Brautaset, *Scandinavian Maritime Law*, 2004, p 332

²⁶ W. Tetley, *Marine Cargo Claims*, p.1899

²⁷ F. Smeele, *The Maritime Performing Party in the Rotterdam Rules*, 2009, p. 6

2.3.2 Rotterdam rules protection and the period of responsibility

The observations put forward with regards to the specific categories of third parties and the period of liability regulated under the Hague-Visby rules and the Hamburg rules cannot apply also to the Rotterdam rules as this international legislative instrument introduces significant changes, especially with regards to the position of third parties to the carriage of goods.

These rules abandon the dichotomy servant/agent versus independent contractor and introduce the one between *maritime performing party* and *non maritime performing party* (see Arts 1(7) and 19). Art 1(7) describes the maritime performing party as a person other than the carrier who performs the carriage obligations “*during the period between the arrival of the goods at the port of loading ... and their departure from the port of discharge*”: it follows that the performing parties (Art. 1(6)) whose operations are not entirely exhausted within the port area and/or contain inland elements are non maritime performing parties and their liability will not be governed under Art. 19 (they will not benefit from the exclusion of liability regime of the carrier and other maritime performing parties). It follows that terminal operators and other entities which work at sea (like ocean carrier) are now covered under the new convention, without the need for a Himalaya clause for them. Carrier’s employees and crew and master are considered maritime performing parties but cannot be sued under the same conditions applicable to other maritime performing parties (Art 20(4)).

What is interesting to emphasize is that the position of third parties to the carriage (whose activity is exhausted in the sea part of the carriage) is now regulated, as for their liability²⁸ within the rules, as opposed to the previous conventions on carriage of goods by sea which only extended some defenses and limitations to some specific third parties when sued in tort.

Furthermore, Art 1(1) provides for a wider notion of contract of carriage as it “*shall provide for carriage by sea and may provide for carriage by other modes of*

²⁸ Also with regards to *imposing* liability, not just *limiting* it, see Art 20 which holds the maritime performing party directly jointly and severally liable together with the carrier

transport in addition to the sea carriage". The rules present themselves as a *door-to-door* convention, a multimodal transport convention that applies if there is a maritime leg of the carriage (so not a multimodal *stricto sensu* but a "*wet muldimodal transportation*"). In this sense, Art 5 (general scope of application) and Art. 12(1) (period of responsibility of the carrier) make it evident that the period of responsibility runs from the moment the goods are taken over into custody until when the goods are delivered to the receiver; the place of receipt and the place of delivery might not necessarily coincide with the port of loading or discharging. This means that the rules do not limit their application to the maritime section of the carriage, but include also the other phases of the multimodal transport with regards to the liability of the carrier: the maritime performing party will be liable under a different period, i.e. under 19(1)(b). The carrier and the shipper, under Art 12(3), can introduce a tackle-to-tackle period, and this would also impact the maritime performing party's period of liability.

Performing parties that are not maritime performing parties find themselves in a position in which their liability is not governed under the rules: the rules do not exclude the possibility of bringing direct claims against them by the cargo interests and the rules do not provide any defenses to them (but the rules do not prohibit that they limit their liability contractually: their position is very similar in this regard to the one of the independent contractors under the Hague-Visby rules); the liability regime of these third parties will be governed by other relevant (national or even international) rules applicable to the obligations and operations undertaken by them: this does not exclude the applicability of a Himalaya clause contained in a contract of carriage directed to benefit these third parties: as noted above, the difficulties of the period of responsibility of the carrier posed by the other conventions are now overcome as it is possible for a contractual clause to explicate its effects at any stage of the carriage included in the *door-to-door* time frame. Thus an inland carrier (a performing party that is not a maritime performing party) will still be able to benefit from a Himalaya clause extending to him the defenses and limitations of the carrier under the Rotterdam rules. Such limitation of liability of the inland carrier will have to be coordinated with other potentially applicable overriding set of rules governing

the inland carrier's operations. Furthermore, it is to be added that a Himalaya clause that limits the liability of an inland carrier (by extending to him the carrier's benefits) will ultimately benefit the carrier by reducing its vicarious liability (Art 18), yet this clause would not enter in conflict with Art 79(1), since the rules do not govern the liability of the non maritime performing party and leave its regulation to national laws: the Himalaya clause is in this point thus legitimate²⁹.

In conclusion, it must be noted how the reach of the Rotterdam rules, both in terms of the period of liability of the carrier and the subjective scope of application of the carrier's defenses to a much wider group of third parties, has almost set aside the need for a Himalaya clause, as it has been also argued by many scholars³⁰: what is important to stress in this context is though what the actual aim of the Himalaya clause is. It is not only to extend the carrier's benefits to third parties, but, first of all, to attempt at regulating the actual liability of the third party by granting it a total exclusion of liability: this is clearly stated in the first sub-paragraph of the clause and should not be underestimated also in light of the fact, that, despite that uniform rules do not regulate the liability of servants/agents (in the Hague-Visby and Hamburg rules) or employee of the maritime performing parties and the master and the crew of the vessel (Rotterdam rules), some national legislations may approve the first sub-paragraph of the clause as they allow waivers of tortious liability also towards third parties³¹.

²⁹ A. von Ziegler *et al* , *The Rotterdam Rules 2008*, p. 334

³⁰ R. Williams, "*The Overall Impact of the Rotterdam Rules on the Liability of Multimodal Carriers and their Subcontractors*" in "*Carriage of Goods by Sea, Land and Air*", 2014, p. 217

³¹ see Chapter 3

3 Contract for the benefit of a third party as the model for the Himalaya clause under civil law

Most of the conflict that has surrounded the Himalaya clause in almost all of the years of its existence in the realm of common law, has been centered around the admissibility of a clause that, in order to achieve its effects, necessarily derogates from the doctrine of privity of contract.

The civil law legal system acknowledges as well the principle of the relativity of contract, meaning that its effects are relative (as opposed to absolute/*erga omnes*) and binding only for the parties that entered into that given agreement. However, most civil law countries did not have a great deal of difficulty in accepting the legal effects of the clause as they were familiar with the legal device of the “stipulation for another”³². Perhaps the only doubts (apart from the ones raised by the author Tetley, see below) seem addressed to the possibility of the benefit being an exclusion of liability clause.

This chapter will discuss these topics and will try to add also new perspectives suggested by some scholars in different jurisdictions as to alternative contractual models under which consider the Himalaya clause.

³² Henceforth referred to also as “contract to the benefit of a third party”

3.1 Structure of the contract for the benefit of a third party

The contract for the benefit of a third party consists in an agreement between a promisee/stipulator and a promisor: the promisor obliges himself to the counterparty (the promisee) to perform an obligation for the benefit of said third party (the beneficiary)³³ : the third party does not assume obligations but is able, under this contract, to acquire only rights/benefits.

The conferment of only rights and benefits to the third party (basically situations that imply only advantages and not burdens for the beneficiary) is the reason behind the admissibility of this legal device notwithstanding the derogation to the principle of relativity of contracts³⁴.

More specifically, the third party will never become a party to the contract, but once the stipulation is valid and in force and (for the jurisdictions that require this) the third party has accepted the contract, then he will acquire the right to the performance and the right to enforce such performance in case the promisor has not fulfilled his obligation (the beneficiary will be empowered with a contractual action against the promisor; see the different national civil code's articles recalled above).

According to the structure of the stipulation for another, in the context of the Himalaya clause contained in a contract of carriage of goods by sea, the party committing itself to the performance of the promissory obligation (the promisor) is the cargo interest, which holds that no liability will be attributed to the third party, or that limitations of liability will be recognized to this party [[this promise follows from both the first paragraph of the clause and the second one]]; the promisee, the subject receiving the promise object of the stipulation, is the carrier and finally, the beneficiary is the group represented by the third parties

³³ For a brief overview of some relevant national legislation see the following articles in the corresponding national civil codes: Art 1121 France, Art 1121 Belgium, Art 1411 Italy, Art 1257 Spain, Art 1446 Québec

³⁴ The acquisition of rights only, and not of obligations/duties, is also the reason why most authors reject the idea that, if the Himalaya clause is to be construed as a contract for the benefit of a third party, the agreement concerning the jurisdiction and arbitration clause ought not to be part of the clause as it is not possible to construe it under the category now described for the obligations it is liable to impose, see sub-clause (b) of the specimen Himalaya clause

contemplated in the clause (servants, agents and much more, see clause provided).

3.2 Requirements for the validity of the stipulation

The stipulation is valid only so long as the stipulator has an interest in providing a benefit to a third party: the interest can be a financial interest just as a moral interest. In the carriage of goods, excluded the occurrence of a moral interest, the carrier will have an interest in providing the third party with a benefit when there is between them a relationship, based on which the carrier/stipulator is the debtor of the third party/beneficiary: this can well be if between them there is an agreement that provides the liability of the carrier towards the servant/independent contractor when the latter is held liable by the cargo receiver (for damages occurred to the cargo). This is often the case, as most employment contracts and service contracts between the carrier and respectively the employee or subcontractor will contain indemnity clauses by virtue of which the carrier is to indemnify the employee/subcontractor for liability incurred against third parties.

For the existence of the interest it is not necessarily required a prior obligation from the stipulator towards the beneficiary: this obligation can well arise after the stipulation of the contract. This is true for the life insurance contract, where the person taking out insurance is to benefit a third party (his relatives; here the interest has a moral base not a monetary one) when the death-event will strike; alike is the Himalaya clause, where the liability of the carrier towards the servant arises (this is the obligation relationship between the carrier and the servant/independent contractor) when the damages occur (so there is not debt from the carrier to the servant until this moment).

The Italian Court of Cassation (the highest instance in Italy for civil and criminal matters) has found, for example, the interest of the carrier to introduce a benefit for a third party to have an economical nature, as the carrier can obtain more favorable negotiation terms if it provides for the protection of its servants and independent contractors by extending to them a contractual protection in the form of exclusion of liability: the protection of independent contractor will imply

a reduced need for insurance and lower insurance costs which also will turn into a commercial benefit for the carrier³⁵.

The Canadian author Tetley indicates other requirements necessary for the validity of the contract: they are the presence of a valid contract at the base of the stipulation, a third party/beneficiary that must exist or be determinable at the moment the promisor executes the performance of the stipulation and the acceptance of the third party to the receipt of the beneficial performance of the contract.

The author casts doubts on the sufficient determination of the third party beneficiary, as it is suggested that the clause is often drafted in such a way to include a multitude of different classes of beneficiaries, not belonging to a homogenous group and thus not clearly identifiable: some of the beneficiaries are in fact direct employees of the carrier, others are under its supervision, while even other ones are only contracted for a specific operation and not under the direct supervision of the carrier: the loose nature of this category of beneficiary would negatively impact the certainty of legal relationships and the identity of the parties involved in the stipulation³⁶.

Furthermore, it seems that the stipulation for a third party confers the right to the performance of the obligation in the contract but also the right to enforce towards the promisor such obligation in case the performance is not carried out: in the context of the Himalaya clause, there is no positive conduct that is expected from the consignee but on the contrary, a restraint from doing something, either not to sue the third party or not to hold the third party liable for the damages caused (either not to hold the third party liable at all, as follows from the first paragraph of the Himalaya clause, or not to hold the party liable beyond the limitations to its liability, which is the second sub-clause).

This situation creates an apparent contradiction between the contract for the benefit of a third party and the Himalaya clause: this is further elaborated by Tetley by recourse to the figurative images of the destruction of a right and the even more evocative “sword” picture: in the first case, his focus centers on the

³⁵ A. Antonini, *Liability of Terminal Operators, Case History and Case Law*, 2008, p. 114

³⁶ W. Tetley, *The Himalaya Clause – Heresy of Genius?*, p. 1894

stipulation for a third party as a device to confer positive rights (as in the sector of automobile and life insurance) that can be directly enforced by the beneficiary, whereas in the Himalaya clause, the third party can only be granted a negative right to deprive the cargo owner of the cargo claim (when the Himalaya clause provides for total exclusion of liability) or to limit the amount recoverable (when the clause sets the that the limit of liability applicable to the servant is the same as the one of the carrier), thus effectively “destroying” (totally or partially) the claims and rights of the receiver.

The sword picture in stead expresses the defense mechanism upon which the Himalaya clause rests, as it is not meant to confer a situation from which, on its own initiative the third party can enforce a right but to give it a defense (as if it was a sword) once the consignee has decided to pursue his claim.

Despite the view of this author, it must be stated that the thesis of the Himalaya clause as a contract for the benefit of a third party is not challenged under the civil law system countries and that examples of case will now follow also as to the possibility of the benefit of the clause being an exclusion/reduction of liability.

3.3 Exclusion/restriction of liability as object of the contract for the benefit of a third party

This paragraph will not focus on the legitimacy of excluding tortious liability for negligent conduct against third parties (Chapter 3 of this contribution will deal with this matter), rather if, according to the rules on the contract for the benefit of a third party, it is possible to include in the benefit that the stipulation confers on a third party an exclusion/restriction of liability: the view of the author Tetley has been presented above also as to the lack of requirements that the Himalaya clause suffers from. Some national legislation examples and case will be now presented to support the idea of the appropriateness of the incorporation of the Himalaya clause under the stipulation for another.

Many systems that provide in their legislation for contractual third party rights, admit that the right attributed to the beneficiary can consist also of the right to

enforce a clause that excludes or limits liability³⁷ but just a handful of legislations expressly provide for it, among which the English law by Section 1(6) of the Contracts (Rights of Third Parties) Act 1999 or the Dutch civil code. Art 6:257 NBW (Dutch Civil Code) expressly provides that if in a contract one of the parties is exempted for contractual or tortious liability of the subordinates, even the latter ones can then invoke the liability exemption if a direct claim is brought against them, as if they were party to the contract; the provision expressly requires that the exemption extended to the third party pertain to the liability of the employer and/or of the subordinate; if the exemption is provided only for the employer then the subordinate will not be able to claim the defenses. Comparative law authors have praised the introduction of such provision in the Dutch civil code, as it rests upon the rationale that, by extending the exemptions/limitations to the subordinates³⁸, it preempts the scenario where the employees proceed against the employer which would then deprive the liability exemption clauses of their meaning and purpose³⁹.

The contract to the benefit of a third party confers a right, but it has been acknowledged by courts that such stipulation can also have as its object the waiver of a right of action⁴⁰.

The construction of the Himalaya clause under the rules of the stipulation for another have thus been upheld in many countries: to cite but a few, the German Highest Court declared that a third party should be protected according to the mechanisms of the contract for the benefit of a third party even if the underlying contract of carriage does not contain an express term for its protection: the implicit protection stems from an interpretation by the court of the contract's purposes, among which is the protection of the carrier that is realized to a better extent if the third party is not held liable, or if the third party's liability enjoys

³⁷ See Unidroit, Art. 5.2.3 of the Principles of International Commercial Contracts: these are principles of international commercial contract drafted by the "*Institut international pour l'unification du droit privé*", an international organization with the objective of harmonizing private international law

³⁸ The code refers to "subordinates", implying thus an employment relationship, which, in the context of the carriage of goods by sea, renders the provision applicable to crew members, and other subjects which are employed by the carrier

³⁹ Kortmann-Faber, *Contracts and Third Parties*, p. 248

⁴⁰ Italian Corte di Cassazione C76/2663, C 69/23343

limitations: it is interesting to notice how the application of the general rules on limitation of liability clauses did not lead in this case to a restrictive interpretation of the subjective scope of the beneficiaries⁴¹; the previous case is based on the leading case heard as well by the German *Bundesgerichtshof*, which stated that the master of the vessel was not to be held liable [[see Judgment of July 7, 1960, *Bundesgerichtshof*, 1960 M.D.R. 907 (W.Ger.); for further references to (West) German case law concerning the admissibility of the Himalaya clause, see M. Sturley, *International Uniform Law in National Courts: the Influence of Domestic Law in Conflicts of Interpretation*, 27 Virginia Journ. Intl law, 729 (1987)]]; Italian case law also validated the Himalaya clause under the rules of the contract to the third party without particular difficulties [[see Tribunale Genova 20 November 2000 in *Dir. Marittimo* 2002, p 989⁴². Italian case law also validated the Himalaya clause under the rules of the contract to the third party without particular difficulties⁴³.

The case *Miles international v Federal Commerce & Navigation and stevedoring* comes from Québec⁴⁴, the superior court of Québec applied Art 1029 of the Civil Code of Québec to the case⁴⁵. In this case the terminal operator availed himself of the Himalaya clause contained in the bill of lading released by the carrier, in order to oppose the claim of total compensation for the damages brought by the cargo owner: the goods disappeared in the period during which they were kept in the storage rooms by the terminal operator while waiting to be loaded onboard: the Québec Superior Court in order to give the clause full validity and the possibility for the terminal agent to benefit from the limitation of liability, turned to the “stipulation for another” provision, contemplated in Art 1029 of the

⁴¹ In the subject matter, the case dealt with the direct liability of a sub-carrier, Judgment of Apr. 28, 1977, *Bundesgerichtshof*, 1977 M.D.R. 819, (W.Ger.)

⁴² See Judgment of July 7, 1960, *Bundesgerichtshof*, 1960 M.D.R. 907 (W.Ger.); for further references to (West) German case law concerning the admissibility of the Himalaya clause, see M. Sturley, *International Uniform Law in National Courts: the Influence of Domestic Law in Conflicts of Interpretation*, 27 Virginia Journ. Intl law, 729 (1987) Italian case law also validated the Himalaya clause under the rules of the contract to the third party without particular difficulties [[see Tribunale Genova 20 November 2000 in *Dir. Marittimo* 2002, p 989

⁴³ Tribunale Genova 20 November 2000 in *Dir. Marittimo* 2002, p 989

⁴⁴ A Canadian province with a civil law tradition

⁴⁵ *Miles International Co. v. Federal Commerce and Navigation Co. and federal Stevedoring Ltd.* [1978] 1 Lloyd's Rep

Québec Civil Code.

Further endorsement of the construction of this clause under the rules of the contract in favor of third parties comes from Art. 5.2.3 of the UNIDROIT principles, where the Himalaya clause is expressly referred to under the section on third party rights.

3.4 Alternative contractual approaches

It is worthy to point out positions of the doctrine that, while remaining less main-stream, hold an interesting point of view. They admit the validity of the Himalaya clause but slightly depart from the structure of the contract to the benefit of a third party and construe the agreement under different sets of rules.

An Italian current of thought places the clause within the category of the *negotiorum gestio*, a Roman law tradition quasi-contractual situation where one party (*negotiorum gestor* or manager) acts for the benefit of a subject (*dominus negotii* or owner) without having received from the latter a delegation or mandate to so perform but does so in the party's interest⁴⁶. In letter (d) of the Himalaya clause provided under the web-site link, it is specified that the carrier is to be considered as acting as agent of the third party: the latter remains thus the owner of the affairs (*negotium*) that has as its object the conferral of specific benefits to his advantage. The contract to the benefit of a third party, instead, does not provide for one subject to act on behalf of another and thus leaves room for the interpretation at hand⁴⁷.

Under civil law, this solution seems also preferable to the one of the authorization to represent or act on one's behalf which would be applicable to sub-paragraph (d) of the clause, as it would avoid the difficulties of proving the existence of the mandate from the third party (the principal) to the carrier (the agent) to represent him (needed under the rules on mandate). This interpretation seems plausible if based on a literal interpretation of the clause, but it would seem to forget that the Himalaya clause has developed in the

⁴⁶ See Art 709 German BGB, Art 1370 French Civil Code, Art 2028 Italian Civil Code, Art 2292 Louisiana Civil Code, to recall but a few; it is interesting to note how *negotiorum gestio* is undisputedly the contractual basis for another significant set of rules typical of the maritime sector, namely salvage

⁴⁷ See more on this: W. Tetley, *Proving the Contract or Tort*, p. 17

common law realm, where the sub-paragraph that provides for the agency relationship between the carrier and the third party is meant to bypass the obstacles of the privity of contract.

A second approach provided by some authors⁴⁸ suggests that a better contractual model that would fit the peculiarities of the Himalaya clause is the contract with a performance for a third party⁴⁹: a contract between a carrier and a receiver where the third party is only the beneficiary of an activity to its favor and has a non- actionable/enforceable position towards the obligor (the cargo receiver). This is different from the contract to the benefit of a third party where the beneficiary is also entitled to enforce the obligation created by the contractual parties to its favor. It follows that, if the injured party (the cargo receiver) does indeed claim the amount of damages against the third party beneficiary of the Himalaya provision, it will be breaching the contract in the part where it promises not to pursue recovery directly from the third party and, as a consequence, the stipulator (the carrier) will have an action for breach of contract against the cargo receiver. An interesting point is then whether the cargo receiver will be nevertheless able to recover damages from the third party, despite his breach of contract, since the third party will not have an opposable exception against the claimant (as a result of empowering the third party only with a benefit to a performance of an obligation, not a right to enforce the promise). It seems that this interpretation would reduce the Himalaya clause per se to a circular indemnity clause, thus maybe missing the true essence of its purpose⁵⁰.

This construction seems though to be more in agreement with the thesis propounded by Tetley where his position was that the Himalaya clause does not confer a position from which to enforce the right object of the promise.

⁴⁸ See A. Antonini, *Trattato Breve Diritto Marittimo*, Vol. II, 2008, p. 289

⁴⁹ This type of contract is not found in the Italian civil code but has been elaborated by the Italian case-law and has very similar effects to the contract with protective effects for a third party, product of the German jurisprudence: see A. Antonini, *ibid*

⁵⁰ For a discussion on the circular indemnity clause, see p. 42

One more alternative solution has been adopted in Germany, with regards to the admissibility of a benefit that amounts to an exclusion clause⁵¹: this has been debated by scholars as the German provision on the contract to the benefit of a third party (Art 328 BGB) explicitly refers to an actionable right of the beneficiary while it does not make any reference to the instrument of (invoking of) an exception. In order to overcome this obstacle the German case-law has resorted to the legal institute of the *pactum de non petendo*, meaning that the liability exclusion clause negotiated by the parties imposes an obligation on the injured party not to proceed even against the servants of the counterparty⁵². Other German scholars sustain the thesis that the *pactum de non petendo* is to be preferred to the contract in favor of a third party, as the beneficiary has only a plea against the claim of the cargo interests⁵³.

⁵¹ Despite the fact that previous case law, see above, did not dwell on this point, recent scholars have suggested the different approach consisting in the *pactum de non petendo*.

⁵² See the leading case on point adjudged by the *Bundesgerichtshof*, 7 December 1961 and commented in *Neue Jur. Wochenschrift*, 1962, p. 388; for the *pactum de non petendo* see Koetz Flessner, *European Contract Law*, p.258.

⁵³ See Nicolai Lagoni, *The Liability of Classification Societies*, 2007, p. 283

4 Exclusion of liability clauses

4.1 General remarks on exclusion clauses and different liability aspects

This chapter will focus on the sub-term under letters (a) and (b) of the Himalaya clause where respectively, a total exclusion of liability of the third party and a restriction of the liability of the third party are envisaged.

This chapter will discuss the validity of these sub-clauses from the perspective of the rules applicable in the context of exclusion/limitation of liability clauses⁵⁴.

These clauses consist in terms/agreements the source thereof being contracts where one party aims at limiting or even completely excluding its own liability for the losses caused while executing the contract. Such agreements can also

⁵⁴ These clauses can be invariably referred to as limitation, exception, disclaimer, non-responsibility, or restriction clauses.

purport to exclude the liability of a third party, typically an employee of the contractual party.

These agreements are very common in commercial practice, not confined to the shipping sector only, and find often a mandatory national regulation in many countries: this regulation is often in place to dictate the limits to which such agreements can be negotiated, in order to prevent unreasonable and unfair terms and in order to protect the interests of the party against which these limitations are stipulated⁵⁵.

Many different clauses can provide for the limitation of the liability of the carrier: our focus will be on the validity of the Himalaya clause, as the typical clause for the exclusion or limitation of the liability (not of the carrier but) of the third party to the contract of carriage.

The Himalaya clause is not to be confused under this point with a clause that restricts the liability of the employer (the carrier) for the damages caused by its servants; the liability of the employer is in this case vicarious liability, and it often cannot be restricted: in the case of the Conventions, the carrier cannot limit his liability, not even his vicarious liability beyond what the rules of the conventions allow⁵⁶; the Himalaya clause instead, is set out to exclude the liability of a servant for its own conduct, but is contained in a contract to which the servant is not a party (meaning that the liability limitation is “negotiated” by the carrier). Therefore the liability of the servant towards the injured party will be an extra-contractual liability: such liability arises out of the performance of the service/employment contract that the servant has with the carrier, but the activities of this contract are connected to the execution of the carriage contract. This type of extra-contractual liability is referred to, by some authors, as

⁵⁵ Often in commercial contracts, the party which such terms can be opposed to has less negotiation sway and influence; considerations could be made with regards to from unfair contractual terms legislation where contracts are not negotiated by the parties and the weaker party, the consumer, adheres to the contract drafted by the interest groups representing the business/counterparty, could be applicable in this context: this is the case also with bills of lading, see W. Tetley, *Marine Cargo Claims*, p. 2088

⁵⁶ Art 3(8) Hague-Visby rules, Art 23 Hamburg Rules and Art 79 Rotterdam rules

prospective liability⁵⁷ as it is the kind of liability that is foreseeable as arising in the course of the execution of the contract: it can be reasonably predicted by the parties to the contract of carriage that the carrier's servants might themselves incur liability towards the cargo interests in the course of the contract of carriage: this is also evidenced by the wording of the clause in its first subparagraph where it declaims such liability to be limited to "*any act, neglect, default on the Servant's part while acting in the course of or in connection with the performance of this contract*". It is important to underline the nature of the servant's liability towards the cargo owner, as a different extra-contractual liability on the part of the servant towards the cargo owner might just as well arise while not being the result of any activity functionally connected to the contract of carriage: the exclusion clause connected in the contract of carriage will not apply in this case, despite the identity of the parties. The connection between the activities of the servant and the ones needed for the execution of the contract of carriage will determine if the third party has acted within the scope of obligations or outside of them, thus resulting in him benefiting or not from the disclaimer clause: this can happen if the servant acts beyond the sphere of his employment (or the independent contractor acts beyond the sphere of the tasks delegated to it) and negligently causes damage to the goods⁵⁸.

It is also important to draw a distinction between the different ways in which contractual liability and extra-contractual liability arise, especially for the purposes of this work where the extra-contractual liability of the third party is analyzed.

The validity of the Himalaya clause as a liability exclusion clause will now be tested under the general rules on liability exception clauses but also the specific regulation provided in the international uniform conventions for carriage by sea.

⁵⁷ C. von Bar, *Non Contractual Liability Arising out of Damage Caused to Another*, p. 894

⁵⁸ This extra-contractual liability is opposed to the kind of extra-contractual liability that is *not linked* to the performance of the contract and possibly would not be excludable by the said contract for lack of the contractual requirements of proper *consideration* or *causa*.

4.2 Regulation of limitation/restriction of liability clauses in international uniform law

All the conventions contain an article that provides for the prohibition for the carrier to lessen or relieve his liability beyond the boundaries set by the rules contained in the very legislation: this implies that covenants and terms where the carrier agrees with the counterparty of the carriage to extend his liability limitation to his favor are null and void⁵⁹.

The rationale behind the prohibition of exculpatory clauses for the benefit of the carrier cannot be the same if the clause is for the benefit of a servant or agent of the carrier. As a matter of fact, the conventions do not provide for a prohibition of an exclusion or extension of the liability regime to the benefit of the third party (except for, the Rotterdam rules which do not allow maritime performing parties to relieve their liability beyond the convention's standards, see above p.15).

The rationale in the first case is to provide a fair balance between rights and responsibilities of the carrier towards the shipper: this principle is elaborated in *Esso Belgium v Nathaniel Bacon*⁶⁰. With respect to the possibility of limiting the liability of the servants/agents, the rationale behind this is that the people representing these functions are parties that would not be able to cover themselves the expenses of "*damages beyond their means*" especially in case the servants are employees of the carrier acting on an individual basis and not as a company (as a stevedoring company)⁶¹.

⁵⁹ The limitations to the carrier's liability provided by the conventions are similar to one another and it is not allowed for the carrier to "contract out" of these limitations and introduce a more favorable liability regime: the Hague-Visby rules provide for an exclusion of liability under Art 4, the Hamburg Convention does so in Art 5, the Rotterdam rules in Art 17; furthermore, the carrier benefits in all of the conventions of a "limits of liability" provision, which caps to a specific amount of units the amount for which can be held liable in proportion to the loss caused

⁶⁰ For a more comprehensive analysis of this case and further relevant case-law on point, see W. Tetley, *Marine Cargo Claims*, p. 2085

⁶¹ See Falkanger, Bull, Brautasaret, *Scandinavian Maritime Law*, 2 ed., p. 331; further on the rationale, see above p. 10

4.3.1 Exclusion of liability provided by the Himalaya clause: sub-clause letter (a)

As mentioned above, a Himalaya clause can provide for a different amplitude of protection with regards to the exclusion of liability: it can either be drafted as providing for a *total* exclusion of liability of the third party or for an *extension of the limits and liability benefits* of the carrier to the third party⁶². In most cases, though, it will contain both terms, first assessing the total exclusion and then the extension of the rights and benefits of the carrier: the two clauses are most often linked by the expression “*notwithstanding the foregoing*” or “*without prejudice to the foregoing*”⁶³, meaning that the two parts operate regardless of each other: the first clause offers the widest protection possible as it excludes completely any liability of the third party, and therefore it must be assumed that it would absorb and include in itself also the extensions of the rights and limitations of the carrier⁶⁴.

The first sub-paragraph of the Himalaya clause provides that “[no servant] *shall in any circumstances whatsoever be under any liability whatsoever ... for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on the servant’s part*”. The wording seems to include any kind of loss possibly suffered with respect to the goods (delay of delivery, loss or damage).

This sub-paragraph does not mention specifically or distinguish between the degree of culpability to which the exclusion is to apply⁶⁵: however, it can be reasonably assumed that the expression “any act, neglect or default”, addresses only acts assisted by a negligent conduct. The juxtaposition of the terms “act”, “neglect” and “default” ought to be read as referring to the nature of the conduct that causes the loss: the loss could then be the result of either a commissive

⁶² See also above, when discussed the differences between the HC protection and the protection of the Convention with regards to the subjective scope of the provisions; see N. Gaskell, *Bills of Lading: Law and Contract*, p. 384, footnote 40: the author wonders why more attention has not been focused on the first part of the clause which purports to confer a total exclusion of liability, but argues that Art 3(8) would make the first part inapplicable.

⁶³ See model clause referred to in this contribution above at p. 19.

⁶⁴ This also means that if the validity of this first provision is recognized, then, *a fortiori*, the second provision will also be valid.

⁶⁵ Whereas sub-paragraph (c) mentions “negligence”.

conduct (a positive act where the doing of something leads to the loss, identifies in the clause as an “act”) or an ommissive one (a conduct where the restraint from doing something causes the loss, in the clause the “neglect or default”). The wording of the clause in point is not clear, but many elements suggest that the clause should be interpreted in the above-mentioned way: the same wording is found also in other standard form versions of the Himalaya clause, present in both bills of lading or charter-party agreements (and also similarly in the text of the uniform conventions) and the lack of accuracy in the wording can maybe be warranted by the fact that such clauses have been historically drafted by business parties and not by legal experts⁶⁶; furthermore, if, based on an *a contrario* reasoning, the clause were to include also intentional behavior on the grounds of the generous wording of the text but also of the consideration that the cargo interests would nevertheless be able to recover directly the damages from the carrier by means of vicarious liability, it should be added that in case of doubt as to the extension of the exclusion of liability and of the intention of the contractual parties, the common law doctrine has elaborated the *contra proferentem* rule that imposes to construe the term in a restrictive fashion against the beneficiary of the term⁶⁷. This would make it seem improbable that the first sub-paragraph, in case a dispute were to arise as to its specific meaning, would be granted such a wide interpretation as to include intentional conduct/reckless acts.

Furthermore, two final general observations must be made: the first one is that, if the Himalaya clause is contained in a contract of carriage governed by the rules of an international convention, the first sub-paragraph would be invalid insofar as it allows an exclusion of liability for gross negligence/intentional damage: it would collide with Art. 4-bis(4) Hague-Visby rules, Art 8(2) Hamburg rules and Art. 61 Rotterdam rules. These rules object to any benefit concerning liability as

⁶⁶ Doubts as to the degree of culpability that the term aims at covering are raised in A. Antonini, *Trattato di diritto marittimo*, p.291.

⁶⁷ See W. Tetley, *Marine Cargo Claims*, p. 2088; a similar principle applies in the civil law jurisdictions, where it is established that all clauses that restrict liability are to be given the narrowest possible interpretation

a consequence of an intentional or reckless conduct and apply also in case where a contractual clause (like the Himalaya clause) would provide otherwise⁶⁸.

The second consideration is a policy order argumentation. *Public order* (more often referred to as *public policy* in common law) is a fundamental rule in most countries and refers to a varied set of principles involving the reasonableness, justice, fairness and “morality” of the law⁶⁹. As such, one of its declinations is that intentional damage or reckless/gross negligent conduct that leads to loss, should not be excluded by the parties, as doing so, would then leave the counterparty defenseless against a conduct that is morally reprehensible. A Himalaya clause that holds the third party not liable for its intentional conduct to cause loss would be caught under this principle and be declared invalid.

These public order aspects, present in most common and civil law countries, would then apply also in cases where the Himalaya clause is contained in a bill of lading not governed by the international rules and only under national laws.

With regards to the effects produced by the exempted negligent conduct of the third party, the sub-clause refers to *any loss, damage or delay*. These damages correspond to the ones for which the carrier and the third parties can avail themselves of the defenses and limitations of liability under the conventions: the carrier and third parties cannot avail themselves of the defenses of the Hague-Visby convention in case of delay (delay is not regulated under this convention).

The first and second sub-paragraphs of the Himalaya clause is to apply, in light of the above, only with regards to negligent conducts: this sub-clause has now to be tested under the possibility of providing for a total exclusion of tortious liability of a servant/independent contractor towards a third party.

Public order considerations play a role in this scenario as well: when a fundamental right is impinged upon, the clause could be considered inapplicable, because the legal order admits interference with or limitation of that right only by a legislative act (i.e. when the legal order itself has explicitly provided so) and not by the will of the contractual parties. The limit that such exclusion encounters is the nature of the right upon which the exclusion/restriction is to

⁶⁸ The Himalaya clause cannot override a mandatory clause of the contract in which it is contained.

⁶⁹ See W. Tetley, *Marine Cargo Claims*, p. 2082

be applied, meaning that the violation of an absolute and not disposable right should never encounter limitations such as an exclusion of liability for the person violating that right. It is debatable if a servant could be able to invoke the defense of a Himalaya clause against a cargo interest when the goods are totally destroyed or completely lost due to his personal negligence: the international conventions attribute liability for this case to the carrier, but do not address the position of the servant (only as the beneficiary of the carrier's exclusions); the Rotterdam rules do attribute liability to maritime performing parties, thus including third parties involved in the carriage, except for the crew and the master of the vessel used for the relevant carriage and employees of the maritime performing parties): a Himalaya clause could then be the only shield against a direct action from the cargo owner. The solution to this matter could then depend on the specific considerations case-by-case made by the courts (for instance, what goods were lost, the amount of the goods lost, etc.) and the extent of public policy that the specific court adopts⁷⁰.

Public order would definitely exclude the applicability of the Himalaya clause in a case where the third party had caused physical injury: this case is not relevant in the carriage of goods, since the Himalaya clause applies where the claimant is the Merchant, but could be relevant in the case where the clause is inserted in a transportation of passengers contract and where the claimant is thus the beneficiary of the transportation, i.e. the passenger⁷¹: the third party would not be exculpated even by evidence of slight negligence on his part⁷².

As mentioned, third parties' liability is not regulated directly by the international uniform rules (with the exception of the Rotterdam rules), but, when the identity

⁷⁰ The "Study Group on a European Civil Code", a group on the harmonization of the private law of the different European countries, suggests that the entity of the "legally relevant damage occurred" should be considered: see C. von Bar, *Non-contractual liability arising out of damage caused to another*, 2009, p. 894

⁷¹ A Himalaya clause is a popular clause in the shipping and other transportation industry and it is also contained in contracts other than carriage of goods: it is emblematic in fact that the name given to the clause emerges from a contract of transportation of persons by sea, see p. ... ; see online link with Himalaya clause model for passenger transportation at

[https://www.bimco.org/Chartering/Clauses/Himalaya Clauses for Passenger Tickets.aspx](https://www.bimco.org/Chartering/Clauses/Himalaya%20Clauses%20for%20Passenger%20Tickets.aspx)

⁷² E. Peel, *Treitel on the Law of Contract*, 2003, p. 249

of such third party coincides with one of the entities whose liability is regulated by the conventions, then the convention will indirectly regulate also this third party. This is case for the shipowner that acts as a third party for the purposes of the contract of carriage where the carrier is a charterer who has entered into a charter-party agreement with the shipowning company. In this case Art 3(8) Hague-Visby rules imposes that the liability of the shipowner cannot be limited beyond the convention, so it will not be possible for the shipowner to benefit from a Himalaya clause where its negligent conduct is exempted totally from liability⁷³.

A similar situation arises under the Hamburg rules when an actual carrier is considered the beneficiary of the Himalaya clause: as evidenced above, under the concept of “Servant” any third party connected to the carriage would be included as the beneficiary. Yet, the liability of the actual carrier cannot be excluded (Art 10 read in combination with Art 23) for negligent conduct that produces damages, delay or loss of the goods (unless an exempting factor intervenes as per Art 5 to exclude the liability of the sub-carrier).

The Rotterdam rules regulate directly the liability of some third parties that are defined as maritime performing parties (Art 7): these parties can be well acting within the concept of “Servant” of the specimen Himalaya clause reproduced in this work: the first sub-paragraph of this clause will not exclude the liability of such parties (in accordance with Art 79) beyond what the Art 17 (basis for liability) provides for the maritime performing carrier (Art 17’s basis for liability is applicable to the maritime performing party by virtue of Art 19).

The above-mentioned instances reappear in the context of the circular indemnity clause where the total exclusion of liability conferred by the clauses would collide with the third parties if their liability is regulated under the conventions⁷⁴.

⁷³ The rationale of the inclusion of the shipowner in the Hague-Visby rules in the context of the carriage contract is to empower the cargo interests with one more entity, other than the carrier, against which to direct cargo claims, so to guarantee the satisfaction of the claim of the cargo owner.

⁷⁴ See below p. 42

4.3.2. Exclusion of liability provided by the Himalaya clause: sub-clause letter (b)

The second sub-paragraph of the Himalaya clause has been already discussed in the previous chapter: it will be recalled nevertheless in this context as to the applicability of general rules on exclusion clauses to it.

Whenever the national rules admit the tortious liability of the third party for loss, damage or delay in delivery of the goods, this clause could be relevant in relieving some of the liability of the said party. This clause confers to the third party the same protection that the carrier receives under the conventions that regulate the bill of lading that contains the Himalaya clause.

The conventions extend specific defenses and limitations of liability to the carrier in presence of loss, delay and damage to the goods: the same basis for liability applies to the third party, as Art 7(2) Hamburg rules states that the third party is to benefit of these provisions when faced by an action as the one of Art. 7(1). The same is provided under Art 4-bis(2) which refers to the same type of action (an action for damages or loss of cargo) brought against the carrier.

As it can be seen this sub-paragraph does not totally exclude tort liability (as the first one does), but as pointed out on several occasions (p. 33) , it is to be construed as a restriction of liability clause, thus the considerations provided above on the application of the general rules on exclusion of liability clauses will be valid also in this case.

This sub-paragraph operates in a residual manner meaning that, were the benefit of the total exclusions of liability under the first sub-paragraph not to be recognized⁷⁵, the third party would benefit of the liability limitations afforded to the carrier (as expressed in this sub-paragraph).

Furthermore, as evidenced above at p.33 , this sub-paragraph would then “add to” the international uniform protection *only where* it aims at covering *all third parties* to the carriage as long as they carry out some activity connected to it, whereas, under the material scope of exclusion, the clause would under this point not add to the protection of the international uniform law applicable to the contract of carriage where the Himalaya clause is inserted: the second sub-paragraph, anchoring the amplitude of its protection on to the rules of the

⁷⁵ This is the case when the total exclusion for negligent act is not admitted under the national rules or collides with the provisions of one of the applicable conventions.

convention that regulate the bill of lading in which the Himalaya clause is contained, would limit the liability of the servant/independent contractor (all third parties) according to the rules of the specific convention (i.e. according to the defenses and limitations of liability provided under each convention).

This highlights the big gap in the protection afforded by the first sub-paragraph vis-à-vis the second one: if the first sub-paragraph is declared null and void while the second paragraph is valid, this could result in the third party being liable for a negligent act that brought damage and being able to only limit its liability, not to completely exclude it.

A *questio quid iuris* could come about if the first sub-clause is considered invalid because it provides too wide an exemption for the servant: would this affect the whole clause and its validity as a whole? The law that emerges from jurisprudence seems to accept that if a clause is struck by nullity⁷⁶ limited to a specific party, the rest of the clause can “survive” and still be applicable: this follows from the principle of *severability* of the clause⁷⁷. As a result of this, even if the first sub-paragraph of the Himalaya clause were to be struck by nullity where it grants total exclusion of liability for a shipowner (whose liability cannot be completely excluded ex Art 3(8) Hague-Visby rules), the rest of the provision would still apply for the part where it extends the defenses or limitations of liability of the carrier to the third party.

4.4 Exclusion/restriction of tort liability by contract

Another important issue to consider is if the parties are allowed to contractually exclude/limit tort liability: this observation will apply to the first prong of the Himalaya clause where the extra-contractual liability of the third party is to be completely excluded; it can also apply to the second prong of the clause, to the

⁷⁶ Note that the categories of nullity, invalidity and inapplicability are used here interchangeably, meaning any sanction that affects the provision and deprives it of any legal effects; these categories are however distinct in the law of different countries but for the purposes of this contribution they are considered equal.

⁷⁷ See *Svenska Traktor Akt. v Maritime Agencies*, in Lloyd’s Rep. p. 130

extent where the extension of the defenses of the carrier to the third party contributes to limiting part of the third party's tortious liability⁷⁸.

Tort liability is regarded as a violation of an *erga omnes* right, i.e. a right enforceable against all individuals, a right that comes about as it is regarded by the legal order worthy of protection, whereas a contractual breach (a contractual liability) is regarded as a lesser violation as it arises when the right to the fulfillment of a specific obligation has not been respected, when a relative right (one enforceable only towards the specific counterparty of the contract) has been infringed, a right that comes about only as the product of the free will of the parties and not directly as the product of the legal system. A terminal operator might incur contractual liability if it does not respect the terms of the contract and it delivers wrong goods to the cargo receiver (or, for example, if it does not deliver the goods timely): this conduct will amount to a breach of the contractual obligations of the terminal operator towards the counterparty of the contract (which could be, under a contract of service, the carrier of the cargo, or, under a FIO clause, the cargo interests); if the goods were lost or completely damaged, this would amount also to an extra-contractual breach and produce tort liability. The existence of both contractual and extra-contractual liability is recognized in most jurisdictions and from one fact both liabilities can arise and it is possible to claim both under free concurrence of liabilities rules.

Since tort liability affects more directly primary goods and rights that the legal orders aim at protecting, some jurisdictions are not keen in allowing private parties (by means of an instrument expression of the free will of the parties, i.e. the contract) to restrict their liability regarding this realm. In France the jurisprudence is oriented towards denying the possibility of excluding tort liability, and so are Italy and Spain whereas countries such as Germany, England

⁷⁸ With regards to the second prong, one could be tempted to answer that it is possible to limit the liability of a third party, since it is so established in the international uniform law conventions when they allow to limit part of the liability of the third parties against a cargo interest, but it must be evidenced how exactly here the core of the matter lies: one thing is in fact to restrict (or even totally exclude) liability by means of a statute or a conventions, another is to leave it to the free will of the parties to limit/exclude such type of liability: it can be argued that the issue at hand deals then with the source of the exclusion of the liability.

and Belgium allow such restrictions, provided that the liability is founded on a negligent conduct⁷⁹.

Another important aspect in this context is the fact that the tort liability that the Himalaya clause is set out to exclude is a tort liability *towards a third party* and not towards the contractual counterparty: many jurisdictions allow to exclude to some degree the liability that arises out of the negligent conduct of an employee towards its employer as this liability is attributed to the risk of enterprise, a sort of allocation of risk doctrine that recognizes that the employer/entrepreneur is reasonably expected to suffer while carrying out such an activity that will bring him a commercial gain/profit. But the legal systems do not justify an exclusion of the liability of an employee when such liability causes damages and losses to a third party external to the employment relationship (except for some: see the Dutch civil code at Art 6.257 NBW, mentioned above).

In the context of the applicability of the Himalaya clause, it can be inquired also if to exclude the tort liability of a non-contractual party is possible under the rules that govern exclusion of liability⁸⁰: since the contractual party against which the exclusion is enforced is in a less favorable position, the jurisprudence in many countries has stated that the extent of the liability exclusion (what losses/damages are covered by the liability restriction) has to be made clear, and where it is not clear, it will be construed *contra proferentem*: it follows that the identity of the third party against which the cargo interests cannot enforce a liability claim will have to be clearly identified⁸¹. If this requirement were not fulfilled, it would seem that the clause could not operate against the cargo interests: the requirement of the identity of the beneficiary is also present in the rules that govern the contract to the benefit of a third party. Due to the particular nature of the Himalaya clause, which is at the same time an exclusion of liability clause and a contract for the benefit of a third party (which does not confer a right but a defense, or exclusion of liability), the same requirement is present but it satisfies different rationales: in the context of the exclusion clause, the

⁷⁹ See C. von Bar, *Non-contractual liability arising out of damage caused to another*, 2009, p. 895-899

⁸⁰ It has been evidenced that the rules that govern the contract to the benefit of a third party can apply to this clause.

⁸¹ See C. von Bar, *ibid.* p. 895-899

justification for this requirement is that the exclusion of liability implies that the cargo interests cannot proceed against a specific subject (thus limiting their possibilities of recovering the damages to the carrier only, possibilities which will be furthermore limited by the carrier's limitation of liability rules present in the international conventions) and it is evident how this information is important as it could make the cargo interests choose a different carrier that offers a contract of carriage free from this clause⁸².

If the contract of carriage in which the Himalaya clause is inserted, is between a carrier (representing a business) and the cargo interests represents a consumer, the contract is also caught under the rules on unfair contract terms. Many national legislative systems provide for an unfair contractual terms regulation⁸³.

5 Circular indemnity clauses

This clause acts as an alternative drafting instrument to the Himalaya clause used by the parties to a contract of carriage (or often also charter-party agreements) to achieve the result of protecting the third party from claims from the consignee for damages to the cargo. This clause is often embedded in the text of the Himalaya clause or it accompanies it as an additional sub-paragraph but it is considered a separate provision from the Himalaya one⁸⁴.

This clause consists of two parts: one is the undertaking from the cargo interest to the carrier not to sue or make any allegation as to liability of the third party; the second part lays down that, in case the cargo owner proceeds with a claim

⁸² For the rationale in the framework of the stipulation for another, see previous chapter.

⁸³ Also in light of regional supranational legislation such as the EU Directive on unfair terms in consumer contracts Council Directive 93/13/EEC.

⁸⁴ See G. Treitel *et al.*, *Carver on Bills of Lading*, 3 ed., p. 468

against the above third party, in breach of the promise, the cargo owner will indemnify the carrier for the consequences suffered by the carrier from such claim.

The first part of the clause is similar to the first paragraph of the Himalaya clause, which provides that no liability shall be claimed against the third party to the contract of carriage. It would seem that if no liability is to be moved against the third party, *a fortiori*, no action for such liability should be taken: it would thus follow that the first sub-paragraph of the circular indemnity clause only refers to the procedural aspect of the waiver to enforce liability against the third party (whereas the Himalaya clause's language is more general and states broadly that no liability shall be imposed). Despite this consideration, in *The Starsin*, the British court hearing the case, established that "*a stipulation that third parties shall not be under any liability to the cargo interests cannot be read as a covenant not to enforce such liability*"⁸⁵.

The mechanism and rationale upon which this clause builds consist in making it unattractive for the cargo owner to proceed directly against the tortfeasor (the third party) as by doing so, the cargo interests would meet their own claim and eventually, not achieve any effective restoration of the damage suffered: as a matter of fact, once the cargo owner proceeds against the wrongdoer, the latter will have to compensate the former; this causes the third party/wrongdoer to proceed against the carrier by virtue of an indemnity clause contained in the contract that regulates their relationship (most often, either a contract of employment or of service): the third party will claim from the carrier the amount it compensated to the cargo owner; lastly, the carrier, by virtue of the circular indemnity clause, can seek indemnification from the cargo owner with regards to the amount conferred to the servant (which is the exact amount the servant was held liable for against the cargo owner). It is clear how this circular mechanism, as mentioned above, prevents the cargo interest from obtaining any effective restoration.

⁸⁵ See *Homburg Houtimport v Agrostine Private (The Starsin)* [2003] and B. Eder *et al.*, *Scrutton on Charterparties and Bills of Lading*, 22 Edition, p. 57; it is doubtful that a similar conclusion would be reached under civil law in light of the above considerations.

This seemingly elaborate structure has the advantage over the Himalaya clause of not requiring an agency relationship between the carrier and the servant/independent contractor with all the difficulties that it implies at common law⁸⁶.

Furthermore, at common law, it allows the promisee (the carrier) to proceed for a stay of the action proposed by the cargo interest and founded in tort against the third party⁸⁷: this is the result of the breach of the promise not to sue made by the cargo interest to the carrier: this stay of action relies upon the initiative of the carrier (but the carrier has a strong incentive in this as he also has an interest in the third party not being sued, see below) also in light of the fact that the third party itself cannot oppose the promise not to sue to the cargo owner⁸⁸. The specimen clause provided in this work, however, contains an express provision stating that the servant/third party can enforce the promise itself directly against the claimant.

In order for the stay of proceedings to be successful, the carrier must have an interest in the remedy: the interest must have a financial aspect and must be a real interest: a sufficient interest can consist in the carrier being exposed to liability to the servant based on the contract of employment/contract of service⁸⁹: in fact, most service agreements entered into between the carrier and its subcontractor (where the subcontractor is offering a service to the carrier for the purposes of the carriage of goods) contain a provision by virtue of which the subcontractor is to be indemnified by the carrier in case of a claim addressed by a cargo interest to the subcontractor; this is also called an indemnity clause⁹⁰.

⁸⁶ The agency doctrine was developed at common law in an attempt to justify the mechanisms of the Himalaya clauses, otherwise unenforceable due to privity of contract.

⁸⁷ A stay of action is a common law instrument provided for under s. 49, Senior Courts Act 1981

⁸⁸ The promise not to sue is enforceable by the third party if it is contained in a charter-party agreement, see B. Eder *et al.*, *Scrutton on Charterparties and Bills of Lading*, 22 Edition, p. 57.

⁸⁹ The promisee must have “a legal obligation to indemnify the third party against liability on the claim brought in breach of the covenant”: B. Eder *et al.*, *Scrutton on Charterparties and Bills of Lading*, 22 Edition, p. 58; see also G. Treitel *et al.*, *Carver on Bills of Lading*, 3 ed., p. 468

⁹⁰ see W. Richards, *ibid.*, p. 217

Under civil law, the first part of this clause, where an obligation not to sue is undertaken by the cargo interest, could be construed as a contract to the benefit of a third party, or, as it is evidenced above⁹¹ as a contract with a performance to the benefit of a third party.

5.1 Nullity of the clause

As the indirect result of the clause is to keep the third party completely free of liability for its negligent acts, such effect must not contravene the rules laid down in the international uniform system: the Hague-Visby rules impose that a shipowner which acts as a third party to the carriage can benefit from the carrier's limitations of liability, but cannot exclude his liability for negligent acts imputable to it (Art 3(8)) beyond what is provided for in the convention: the clause will thus be null and void for the part where it would free the shipowner of liability when such liability is not exempted already under the convention rules; the same reasoning applies with regards to maritime performing parties who, acting as third parties to the carriage, cannot exclude their liability beyond the Rotterdam Convention (Art 79).

⁹¹ See p. 19

6 Coordination issues of the Himalaya clause with other contracts

It has been established that, when a valid Himalaya clause operates among the different subjects of the contract of carriage, the cargo receiver will not be entitled to bring a claim against the third party nor to hold the latter liable (at all or to the maximum extent to which the carrier is liable).

However, the third party to the contract of carriage has most likely entered into a separate contract with the carrier: this contract regulates the activities that the specific third party (a stevedore, an employee such as master or crew when the carrier is also the ship owner, a port terminal operator, etc.) obliges itself to perform to the carrier in order for the carrier to carry out the carriage operation [[as mentioned above, the carriage of goods can consist of many different segments and operations, some of which are carried out by specialized operators, creating thus an intricate connection of different sub-contracts justified in name of the business and commercial specialization of different actors]]. Since the operations carried out by the third party are ancillary to the contract of carriage, some of these activities can be construed as being rendered in favor of the cargo receiver, thus fitting the category of the stipulation for

another. The cargo receiver will thus have the possibility, according to its position as beneficiary of the obligation of the contract, to claim the performance contained in the contract: the cargo owner will thus enforce his right flowing from the contract between the carrier and (for example) the stevedore. Consequently, if the servant/agent/independent contractor while performing his obligations towards the employer (the carrier) for the benefit of the third party (the cargo receiver) produces damages to the goods, the cargo interests will be able to pursue a liability claim based on the contract of service/employment.

As a result, the cargo interests would be able to bring a claim against the servant/independent contractor outside of the system of the carriage of goods contract and outside of the corresponding defenses and limitations of liability.

The Himalaya clause (contained in a different contract) cannot prevail over the provisions of the other contract. Neither can the circular indemnity clause protect against the effects of a contract to the benefit of the cargo interest.

It could be argued that to consider the contract of service between the carrier and the terminal operator as a stipulation for another, would be to misinterpret the function of the terminal operator's activities which are instrumental and subordinated to the carriage of goods: it could be argued nevertheless just as strongly in the opposite direction, by submitting that the contract of service is autonomous and functionally independent from the carriage, also in light of the fact that the operations are complex and economically distinguished from the carriage operations, and require a high degree of investment by the part of such professional businesses. To argue in this direction, would justify to construe the contract of service as a stipulation for another in which the liabilities that arise, should not be limited by contractual clauses (Himalaya clauses) contained in contracts (contracts of carriage of goods) that regulate other matters.

The autonomy of the contract of terminal port service has been recognized, for instance, in a recent case by the Naples Tribunal in Italy⁹² where the judges attributed to such contract the legal qualification of a stipulation for another with regards to the liability of the stevedore against the cargo owner.

⁹² *Ras Assicurazioni v Cosco Container Lines*, Trib. Napoli 4 Febr. 2008, *Dir. Marittimo*, Dec 2010, p. 588

It can be suggested in *de lege ferenda* perspective, that the commercial practice and the legislator take this detail also into account and regulate the matter accordingly, in order to avoid any possibility for holding the third party to the contract of carriage liable towards the cargo interests or in order, at least, to better redistribute the risk allocation.

7 Conclusion

This work has focused mostly on some legal challenges that the Himalaya clause has raised in the context of the exclusion of liability that it confers and the contractual model it is inspired to (this contractual model being similar but not exactly overlapping with the mechanisms of the circular indemnity clause, also described in this work). Neither one of these issues seem to be unresolved, yet this work suggests new perspectives and approaches and raises, nevertheless, critical points where the coordination of this clause is difficult with other contracts in the carriage/logistics sector. With regards to this point, it can be appreciated how the modern trade of carriage of goods by sea is no longer characterized by only pure carriage operations (and other operations are merely ancillary to it), but where the carriage is only one segment of a complex of different operations, as well interpreted and regulated under the Rotterdam rules.

New trends in business organization and legislative developments may induce to question the need of a Himalaya clause: the clause was conceived as a contractual instrument in order to address a situation that the legislator had not regulated and that needed protection for the sake of the organization of the carriage of goods by sea which relied much upon subjects who performed some

of the tasks and obligations of the carrier: individual subjects as employees of the carrier received legislative protection first, eventually, throughout the years and after another sea carriage Convention, under the Rotterdam rules (not yet in force!) even independent contractors of all sorts would benefit of the carrier's protection, making the clause necessary only for inland carriers; furthermore, most independent contractors are nowadays big terminal operator companies far from the secondary position their predecessors occupied in the market with respect to carrier companies: this is also implied within the Rotterdam rules which confer to maritime performing parties (that are not master, crew of the vessel or employees), a position of liability comparable to the one of the carrier. The Himalaya clause, while the Rotterdam rules await ratification, is nevertheless still widely in use, as a very efficient tool for restricting liability, also in light of the lack of an international convention on the liability of terminal operators and the lack of uniformity at the level of national legislation in different countries providing protection for such parties (France being the only major shipping economy to have adopted a specific national legislation for the regulation of the liability of terminal operators).

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